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No. 82-936.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

FREDERICK C. LANGONE,
MADELINE G. SARNO, VICTOR GRILLO,
LOUIS FERRETTI, GAIL A. FASANO,
THE LANGONE FOR LIEUTENANT GOVERNOR
COMMITTEE, AND FRANCIS X. BELLOTTI,
APPELLANTS,

v.

MICHAEL J. CONNOLLY,
AS HE IS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
DEMOCRATIC STATE COMMITTEE,
SAMUEL ROTONDI, JOHN F. KERRY,
LOIS PINES, AND EVELYN MURPHY,
APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
COMMONWEALTH OF MASSACHUSETTS.

Appellants' Brief Opposing Motion to Dismiss of Appellee, Connolly.

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United States Constitution, amend. I . . . . . Passim.

United States Constitution, amend. XIV . . . . . Passim.

United States Constitution, art. III 14

STATUTES

28 U.S.C. §1257(2) 8, 11

28 U.S.C. §1257(3) 8, 11

Massachusetts General Laws,
c. 53, §§1 et seq., ... Passim.

STATEMENT OF FACTS

There are a number of important factual inaccuracies contained in the Motion to Dismiss of Appellee Connolly which are of significance to the issues before this Court.

At page 10, n. 8, of the Motion to Dismiss, it is stated that all factual statements contained therein are derived from the Statement of Agreed Facts. This is incorrect in the following instances:

(1) At pages 40-41 of the Motion to Dismiss, the following assertion is made:

> Although his name did not appear upon the Democratic state primary ballot, Langone was still a candidate for Lieutenant Governor. He sought the nomination of the Massachusetts Democratic Party "by means of pasters or write-ins."

> If he had received write-in votes in an amount sufficient to give him a plurality of the votes cast in the primary, he would have been the Party's nominee. Thus, the "fifteen percent rule" did not deny Langone his alleged "right to run for public office."

There is nothing in the Statement of Agreed Facts which supports in any way the assertion that Mr. Langone sought the Democratic Party nomination as a "paster or write-in candidate". In fact, Mr. Langone did not pursue his party's nomination by any means other than by seeking to have his name printed on the official state election ballot.

(2) At page 62 of the Motion to Dismiss, the following assertion of fact appears:

> The "Rules of the 1982 Massachusetts Democratic Convention" required that candidates file a statement regarding their support of the platforms and the Party Charter. Langone filed his statement with the Democratic State Committee on May 4, 1982. Langone's statement reveals that he knew that access to primary ballots would be determined by the vote of the Endorsing Convention.

The Statement of Agreed Facts again does not support the assertion made by appellee Connolly in his Motion to Dismiss. A true copy of the statement filed by Mr. Langone with the Democratic State Committee was attached to and incorporated in the Statement of Agreed Facts. That statement reveals in its first sentence that Mr. Langone

considered the Convention "non-binding".

(3) At page 63 of the Motion to Dismiss, appellee Connolly asserts the following:

> Until Langone filed his nomination papers with the State Secretary on May 26, 1982, the State Secretary did not know that Langone was a candidate.

Not only does the Statement of Agreed Facts fail to support this assertion but it directly contradicts it. Appellee Connolly's Motion to Dismiss refutes his asserted lack of knowledge at pages 61-62, where it states:

> Langone was sent a copy of an announcement released by the State Secretary on April 9, 1982 which informed Langone

> that the Governor had requested the advisory opinions of the Justices. All candidates were invited to file briefs with respect to the question of the "fifteen percent rule".

Appellee Connolly invited Mr. Langone to file a brief, as a candidate, with respect to the request for an advisory opinion on April 9, 1982.

JURISDICTION OF THIS COURT

At page 3 of the Motion to Dismiss, appellee Connolly asserts the following:

> At the ouset, it is important to realize that no party in this case has ever challenged the constitutionality of any statute. Thus, the jurisdictional bases invoked by appellants are inapposite.

In fact, there were two distinct challenges to the constitutionality of the Massachusetts statutory scheme for obtain-

ing access to the state primary election ballot. M.G.L.c.53, §§1 et seq. These challenges arose from the doubt cast upon the statutory scheme for obtaining ballot access by the Opinion of the Justices, 385 Mass. 1201, 434 N.E. 2d 960 (1982).

In their Opinion, supra, 385 Mass. at 1204-1208, 434 N.E. 2d at 962-964, the Justices opined that a bill amending M.G.L.c.53, §44, by providing that a candidate's name would appear on the state primary election ballot upon fulfilling the existing signature requirements notwithstanding any political party rule to the contrary would unconstitutionally intrude upon the First Amendment rights of political parties. The Justices specifically declined to determine whether the state Democratic Party's "fifteen percent rule" superceded the existing statutory requirements for ballot access.

Opinion of the Justices, supra, 385 Mass. at 1202-1203, 434 N.E. 2d at 961.

In their Complaint, appellants alleged that the only legitimate requirements for ballot access were those delineated in M.G.L.c.53, §§1 et seq., and that the existing statutes were silent as to any additional requirements imposed by political party rules. Among the questions presented to the Supreme Judicial Court by both the appellants and the appellee Democratic State Committee were whether enforcement of the provisions of M.G.L.c.53, §§1 et seq., required that Langone's name be placed on the state primary election ballot notwithstanding his failure to meet the state Democratic Party's "fifteen percent requirement" and whether enforcement of the provisions of M.G.L.c.53, §§1 et seq., would infringe or abridge the constitutional rights of

the Democratic Party and its members. Thus, in this respect, the constitutionality of M.G.L.c.53, §§1 et seq., was an issue before the Supreme Judicial Court.

As yet, the opinion of the Supreme Judicial Court has not been issued. The Supreme Judicial Court may uphold the constitutionality of the Massachusetts statutory scheme for obtaining access to primary election ballots in which event jurisdiction of this Court would be conferred by 28 U.S.C. §1257(2). Alternatively, the Supreme Judicial Court may hold that the Massachusetts statutory scheme fails to protect the associational rights of the state Democratic Party and its members and is therefore repugnant to the Constitution of the United States in which event jurisdiction of this Court would be conferred by 28 U.S.C. §1257(3).

The second challenge to the constitutional validity of M.G.L.c.53, §§1 et seq., arises from the appellants' allegation in their Complaint that appellee Connolly deprived them of their First Amendment rights without adequate notice and due process of law, while acting under color of state law. However, because the statutory scheme for ballot access is silent as to the additional requirements for ballot access which may be imposed by political party rules, it is appellee Connolly's contention that the statutes permit him and the appellee Democratic State Committee the authority to have excluded Langone's name from the primary election ballot. In support of his position, Connolly relied upon the Opinion of the Justices, supra, 385 Mass at 1201, 434 N.E. 2d at 960. The appellants therefore presented to the

Supreme Judicial Court the questions of whether appellee Connolly acted within his statutory authority by refusing Langone ballot access, whether the appellee Democratic State Committee may regulate ballot access, and if so, whether Secretary Connolly's and the Democratic State Committee's actions consistent with state law were nonetheless unconstitutional in that appellants were deprived of their First Amendment rights without fair notice of ballot access requirements. Fairly included within the appellants' questions is whether M.G.L.c.53, §§1 et seq., is facially invalid as it fails to provide fair notice of appellee Connolly's and the appellee Democratic State Committee's authority to impose ballot access requirements contained in political party rules or whether the statute was invalidly

applied to the appellants. In this respect, then, the constitutional validity of the state statutory scheme for ballot access was an issue before the Supreme Judicial Court. Again, because the opinion of the Supreme Judicial Court has not yet been issued, it is not possible for the appellants to specify at this time whether the jurisdiction of this Court is found in 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3).

ARGUMENT

I. THIS CASE IS A PRESENT, LIVE CONTROVERSY CAPABLE OF REPETITION YET EVADING REVIEW

Appellee Connolly contends in his Motion to Dismiss, at page 60, n. 34, that the appellants' claim that they were denied fair notice of the ballot access requirements is moot. This contention is

grounded in appellee Connolly's assertion that it is now impossible to give appellants the relief they sought from the Massachusetts courts. In support of his position, appellee Connolly relies upon his reading of this Court's rulings in Hall v. Beals, 396 U.S. 45, 90 S. Ct. 200 (1969), and Brockington v. Rhodes, 396 U.S. 41, 90 S. Ct. 206 (1969). Both the assertion that relief is now impossible and the appellee's reliance upon Brockington v. Rhodes, supra, and Hall v. Beals, supra, are in error.

In Brockington, supra, 396 U.S. at 43-44, 90 S. Ct. at 207-208, appellant petitioned in the state courts only for a writ of mandamus with respect to a particular election which by then was past. In Brockington, supra, appellant did not seek declaratory relief having effects beyond the particular election in issue,

did not seek redress for the violation of the voters' rights and did not seek other just and proper redress for the alleged constitutional violations and injuries. In view of the limited nature of the relief sought, this Court ruled the case moot. Id. Similarly, this Court disposed of Hall v. Beals, supra, 396 U.S. at 47-48, 90 S. Ct. at 201. In Hall, supra, the appellants sought only a writ of mandamus, an order in the nature of mandamus and an injunction with respect to an election then past. Again, appellants did not seek declaratory relief, which would have affected future elections, nor did they seek other appropriate redress for the alleged injury to their constitutional rights.

Here, the appellants requested declaratory relief in their Complaint in addition to including claims of injury to

their rights as voters and seeking whatever further redress for their injuries was deemed just and proper by the Massachusetts courts. This case is therefore a present, live controversy as required by Article III of the Constitution of the United States. Moore v. Oglivie, 394 U.S. 814, 815-816, 89 S. Ct. 1493, 1494 (1969).

Another distinction between this case and Hall v. Beals, supra, 396 U.S. at 48, 90 S. Ct. at 201, reveals the liveness of the controversy here. In Hall, supra, amendatory action by the Colorado Legislature operated to render the case moot. Here, M.G.L.c. 53, §§1 et seq., has not been amended and remains silent as to any ballot access requirements which may be imposed by political party rules, and the appellee Democratic State Committee continues to give effect

to the "fifteen percent rule" contained in the Charter of the state Democratic Party. As long as these conditions exist, the Democratic State Committee is apparently free to enforce whatever charter provisions respecting ballot access that the state Democratic Party may enact and the circumstances of the 1980 primary election are capable of repetition as prospective statewide candidates will be unable to divine from the statutes who has authority to impose ballot access requirements and what those requirements will be. As did the appellants in Moore v. Oglivie, supra, 394 U.S. at 815-816, 89 S. Ct. at 1494, appellants here seek declaratory relief with respect to a statutory and a political party scheme for the nomination of candidates to statewide office which remains and controls future elections.

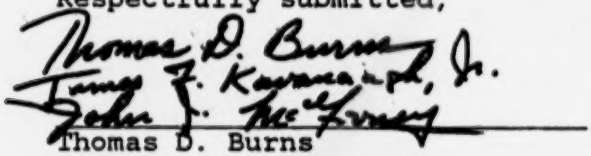
The problem is therefore one capable of repetition yet evading review and the need for its resolution reflects a continuing controversy, as challengers to elections procedures are frequently unable to obtain judicial review until after the elections in issue have been concluded. Moore v. Oglivie, supra, 394 U.S. at 816, 89 S. Ct. at 1494. Democratic Party of United States v. LaFollette, 450 U.S. 107, 115, n. 13, 101 S. Ct. 1010, 1015, n. 13 (1981); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 300-301, n. 12, 99 S. Ct. 2301, 2310, n. 12 (1979); Storer v. Brown, 415 U.S. 724, 737, n. 8, 94 S. Ct. 1274, 1282, n. 8 (1974).

CONCLUSION

For the reasons stated above, the

appellants respectfully request that this Court deny the Motion to Dismiss.

Respectfully submitted,



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